U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 029 52245 Office: CALIFORNIA SERVICE CENTER Date: OCT 12 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center (CSC), denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a developer of integrated circuit products. It seeks to employ the beneficiary permanently in the United States as an electrical engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The director denied the petition because the petitioner did not submit an original labor certification from the Department of Labor.

In denying the petition, the director stated: "In accordance with 8 C.F.R. 1103.3(a)(1)(ii), this decision may not be appealed." The cited regulation reads, in pertinent part: "Certain unfavorable decisions on applications, petitions, and other types of cases may be appealed. . . . Decisions under the appellate jurisdiction of the Associate Commissioner, Examinations, are listed in § 1103.1(f)(2) of this part." The present version of the regulations, however, contains no section 1103.1(f)(2).

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two exceptions that are not relevant to the matter at hand. 8 C.F.R. § 103.1(f)(3)(iii)(B), as in effect on February 28, 2003, specifically excludes denials based upon lack of a labor certification from the class of decisions that can be appealed. The director reasoned that the present petition was denied for lack of a labor certification and, therefore, could not be appealed.

If the director's reasoning was correct, then the AAO would have no choice but to reject this appeal, because it would have no jurisdiction to accept the appeal. The cited regulations, however, appear to pertain to instances in which the petitioner has made no effort to obtain a labor certification, and therefore there is no valid basis for the filing of the petition. In the present matter, the record contains a photocopy of an approved labor certification. At issue here is the *location*, rather than the *existence*, of the labor certification. We find, therefore, that the petitioner was entitled to appeal the director's decision, and that the appeal was properly filed.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(k)(4)(i) indicate that a petition for benefits under section 203(b)(2) of the Act must be filed with an approved labor certification. Pursuant to 8 C.F.R. § 103.2(b)(4), labor certifications must be submitted in the original unless previously filed with CIS. At issue here is whether the original labor certification was, in fact, previously filed with CIS.

On March 12, 2001, the petitioner submitted Forms ETA 750A and B to the Department of Labor, thereby applying for labor certification on behalf of Qiang Zhou. The labor certification was approved on April 20, 2001. Tiffany Penwell, senior immigration specialist with the petitioning company, states "no immigrant visa petition or adjustment of status application was filed on the basis of this approved labor certification." This assertion is not entirely true; the record amply confirms that the petitioner filed a Form I-140 petition on Qiang Zhou's behalf on June 1, 2001. Counsel's cover letter mentions this petition and even supplies the receipt number.

On November 12, 2003, the petitioner filed the instant petition on behalf of the beneficiary. In a November 10, 2003 letter accompanying that filing, counsel states: "We now wish to substitute [the beneficiary] for [redacted] as the beneficiary of this approved labor certification, pursuant to the March 7, 1996 memorandum from [redacted], INS Associate Commissioner for Examinations." That memorandum, entitled *Substitution of Labor Certification Beneficiaries*, indicates that a petitioner seeking such a substitution must submit either the original, certified Form ETA 750 (if the document is still in the petitioner's possession), or else "a photocopy of the original Form ETA 750" and "a written notice of withdrawal of the initial I-140 petition which was based on the labor certification" (if the original document was submitted with an earlier Form I-140). The memorandum also indicates: "The service center should ensure that the petitioner is not using the same labor certification more than once."

Normally, each record of proceeding is considered independently. Here, however, there are unique circumstances, such that the petition filed on behalf of [redacted] is material to the issues in dispute here. Accordingly, the AAO has obtained and reviewed the record of proceeding for [redacted] petition. Submitted with that filing and dated May 31, 2001 is a cover letter from [redacted] of counsel's law firm. This letter lists the "Approved Labor Certification" among the exhibits enclosed with the petition form. The AAO has reviewed [redacted] entire record of proceeding page by page, and there is no labor certification (original or otherwise) in that record.

On November 9, 2001, the director issued a request for evidence (RFE), the body of which reads, in full:

> **Labor Certification**: Every petition under this classification must be accompanied by an individual labor certification issued by the Department of Labor or by an application for Schedule A designation. The occupation listed on the petition is not Schedule A, therefore submit a certified original labor certification (Form ETA 750) issued by the Department of Labor.
>
> The Representative's letter states that the Form ETA 750 was submitted with the petition, but the record indicates no attachment of such document.

The petitioner received and responded to this notice; the RFE in the record bears a time/date stamp, showing that it arrived at the Service Center on December 5, 2001. This response included a letter, dated November 19, 2001, from the petitioner's immigration specialist, [redacted] stating: "The above-referenced employee has left our company. Accordingly, we would like to withdraw the Immigrant Visa Petition for this individual without prejudice." Ms. [redacted] made no mention of the missing labor certification, nor did she contest the director's finding that the document was missing from the record. She did not ask the director to return the original Form ETA 750.

Enclosed with the above withdrawal letter was a cover letter from counsel, dated December 4, 2001. Like Ms. [redacted] letter, counsel's cover letter makes no mention of the labor certification and does not contest the director's assertion that the labor certification is missing from the record.

On December 29, 2001, the director acknowledged the withdrawal of [redacted] petition, stating:

> On December 5, 2001, the petitioner responded to a Service Form I-797 Notice of Action – Request For Evidence with a written notice requesting to withdrawal [*sic*] of the above-mentioned petition filed on June 1, 2001. In accordance with that request, all Service action in this matter is terminated as of the date of this notice.

The relevance of the above discussion of [redacted] petition will become apparent as we discuss the present proceeding. For ease of reference, the AAO has copied the documents discussed above, and placed the copies in the instant record of proceeding.

Counsel's cover letter indicates that the materials submitted in the November 12, 2003 filing include "Original Approved Labor Certification Materials on behalf of [redacted]" including the "Approved labor certification of [redacted] and all documents attached therein." The submission included a *photocopy* of the labor certification, rather than the "Original" document mentioned in the cover letter. Counsel did not refer to the labor certification as a copy, or otherwise indicate that a copy was used because the original was unavailable.

On November 18, 2004, the director issued an RFE, stating:

> Submit a certified **original** labor certification (Form ETA 750) issued by the Department of Labor.
>
> NOTE – It appears that the petitioner may have the original labor certification. The records indicate no other I-140s were filed for [the present] beneficiary and no other references were found. If you have the original labor certification, forward it to this office. If not, please advise as such. Please note that the previous time the ETA 750 was proposed to be used by another beneficiary, the request [for] the original resulted in a withdrawal of the case.

(Emphasis in original.) In response to the above notice, counsel states that [redacted] petition "was submitted with the certified original labor certification" and that "the California Service Center did not return the certified original labor certification to the petitioner after the Immigrant Visa Petition for [redacted] was withdrawn." Counsel did not contest, acknowledge or discuss the director's reference to "the request [for] the original" labor certification that preceded the withdrawal of the [redacted]s petition. Counsel's response, dated December 14, 2004, marks the first time that counsel has responded to the director's assertion that the original labor certification is missing.

On January 24, 2005, the director denied the petition, stating that the record of proceeding pertaining to [redacted] was located and it did not contain an ETA 750, moreover, there was a request for evidence related to that file stating that no ETA 750 was in the file *as claimed by the cover letter submitted.* A petition cannot be approved without an original ETA 750 because it can only be used once and this cannot be assured if the original is not located."

On appeal, counsel asserts that the director should have requested a duplicate labor certification, pursuant to Department of Labor regulations at 20 C.F.R. § 656.30(e). This, however, would not resolve the issue in dispute. The petitioner has submitted a photocopy of [redacted] approved labor certification, and as counsel has noted, the director does not dispute the existence of the labor certification. What is missing is the *original* ETA 750, without which the petition cannot be approved, pursuant to [redacted] 1996 memorandum cited by counsel. That memorandum states: "The service center should ensure that the petitioner is not using the same labor certification more than once." If the original labor certification is unaccounted for, then it could surface in the context of a later petition. The issuance of a duplicate labor certification would not eliminate or reduce this possibility.

Most of counsel's appellate brief is devoted to a discussion of the chronology of the proceeding. Counsel states:

> On November 12, 2003, the petitioner . . . filed the . . . I-140 petition with the CSC [California Service Center], providing a copy of the approved labor certification for a former employee of [the petitioner] ([redacted] documentation that the I-140 petition that was filed on behalf of [redacted] had been withdrawn and therefore the labor certification was available for substitution, and directing the CSC to the file that contained the original approved labor certification.

The above summary is not entirely accurate in its description of the petitioner's initial submission of November 12, 2003. That submission did mention the withdrawn petition for [redacted], but there was no indication that the original Form ETA 750 was still in [redacted] s file. Rather, counsel's November 10, 2003 cover letter contains a list of enclosures, which reads in part:

> Enclosed . . . please find the following:
>
> * * *
>
> **C. Original Approved Labor Certification Materials on behalf of** [redacted]
>
> 10. Approved labor certification of [redacted] and all documents attached therein.

Thus, as noted previously, counsel originally referred to the labor certification as an "original," and said nothing about the director's claimed failure to return the original document. The initial submission of the instant petition identified the earlier petition filed for [redacted] but it contained nothing that could be construed as "directing the CSC to the file that contained the original approved labor certification." Also, as noted above, the initial filing did not contain any acknowledgement or discussion of the director's prior finding that the labor certification was missing from [redacted] ile.

Counsel states:

> The CSC Notice of Decision erroneously states that "there was a request for evidence related to that file stating that no ETA 750 was in the file *as claimed by the cover letter submitted.*" In fact, the Request for Evidence issued in this case stated "It appears that the petitioner may have the original labor certification. The records indicate no other I-140s were filed for the beneficiary and no other references were found. If you have the original labor certification, forward it to this office. If not, please advise us as such."

Counsel here confuses the two RFEs. The director's denial notice refers to the 2001 RFE, regarding [redacted] petition (the reference to "that file" is, in context, plainly a reference to [redacted] record of proceeding). Counsel purports to rebut this assertion by quoting from the 2004 RFE, relating to the present petition. The director's version of events is consistent with the available evidence, and the director's description of the 2001 RFE is accurate.

Counsel continues:

> What is not stated either in the Request for Evidence or in the Notice of Decision, is the fact that the petitioner had requested withdrawal of the I-140 for [redacted] on November 19, 2001, and the CSC issued its Notice of Withdrawal on December 29, 2001. . . . The CSC did not state that it had returned the original labor certificate, or that it was in the process of doing so. . . .
>
> The issuance of an RFE on November 18, 2004, almost three years later, suggesting that the original labor certification was not in the file is evidence of only one fact – that the original labor certificate was not in the file. What has become of the original labor certification is another matter – if the CSC failed to keep track of the original labor certification, the petitioner cannot be held responsible for providing it again.

The November 2004 RFE did, in fact, state that the petitioner withdrew its petition for [redacted], so it is not clear why counsel claimed that this fact "is not stated . . . in the Request for Evidence." It is true that the director "did not state that [the Service Center] had returned the original labor certificate," but this is because the director had already informed the petitioner that the original labor certification was *not in the record.* Therefore, the director's failure to state that the Service Center had returned the original labor certification cannot reasonably be construed as circumstantial evidence that the director had deliberately retained that document.

Counsel's version of events implies that the director waited "almost three years" before notifying the petitioner that the labor certification was missing. The record proves that this is simply not true. [redacted] petition was filed in June 2001; in November 2001, the director notified the petitioner that the labor certification was not in the record. Counsel claims that the director "failed to keep track of the original labor certification," but the record contains nothing that would confirm that the director was *ever* in possession of the original labor certification. On the contrary, the director repeatedly informed the petitioner that the document was absent from the record; it is counsel who took "almost three years" to acknowledge this information.

Counsel states that the director "erroneously *concluded* that no ETA 750 had been submitted; however, this is entirely speculative. . . . On the contrary, Petitioner submits direct evidence that it filed the form ETA 750 as part of its I-140 filing for [redacted] . . . (*See* Exhibit E.)" (Emphasis in original.) Exhibit E consists of counsel's sworn declaration, executed several years after the fact and thus "direct evidence" of nothing, and photocopies of documents from [redacted]s 2001 petition. Among these documents is a photocopy of [redacted]s approved ETA 750 labor certification.

To borrow counsel's own reasoning, these photocopies prove only that counsel *photocopied* the ETA 750; they do not prove that the labor certification was among the documents actually *submitted* to the California Service Center. The director never acknowledged receipt of the labor certification, and repeatedly instructed the petitioner to submit that document.

Either the petitioner never submitted the original labor certification in [redacted] petition, or the director received and then misplaced the labor certification. The burden of proof is on the petitioner, rather than on the director. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Furthermore, the record documents numerous inaccurate statements by counsel (detailed above) with regard to the sequence of events or the contents of various notices. Thus, the reliability and credibility of counsel's version of events is in doubt; the director's statements over the years show no such discrepancies. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). Counsel inexplicably finds fault with the director's failure to state that the director "had returned the original labor certificate," but we cannot ignore that, when first notified that the labor certification was missing from the record, the petitioner's response contained no reaction at all to this information.

If the petitioner and/or counsel were shocked or surprised by the news that the labor certification was missing from the record, this reaction was not at all evident in the response to the RFE. There was no accusation that the director had "lost track" of the document, no claim that the document had, indeed, been submitted, and no request for the director to locate and/or return the labor certification; there was only the withdrawal of the petition on behalf of [redacted] We therefore find it highly significant that, in 2001, neither the petitioner nor counsel contested the director's assertion that the labor certification was absent from the record.

Upon careful consideration of the statements made by counsel and the notices issued by the director, we find the director's contention that the labor certification was never submitted to be more credible and consistent than counsel's counterclaim that the director received, but lost, the labor certification. We will not speculate as to whether the petitioner and counsel *deliberately* or *accidentally* omitted the labor certification from the initial filing.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.